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No. 76-1269

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROBERT BERKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
PAUL J. BRYSH,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The court of appeals entered no opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. A) was entered on December 17, 1976. A petition for rehearing with a suggestion of rehearing en banc was denied on February 15, 1977 (Pet. Apps. B and C). The petition for a writ of certiorari was filed on March 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the grand jury testimony of a government witness, which was inconsistent with the witness's trial testimony, was properly admitted as substantive evidence at trial.

2. Whether the evidence was sufficient to support petitioner's conviction.

STATEMENT

Following a second jury trial[1] in the United States District Court for the Southern District of New York, petitioner was convicted of one count of mail fraud in violation of 18 U.S.C. 1341, two counts of securities fraud in violation of 15 U.S.C. 77q(a) and 77x, four counts of transporting forged securities in interstate commerce in violation of 18 U.S.C. 2314, and one count of conspiracy in violation of 18 U.S.C. 371. He was fined a total of $25,000 and was placed on probation for five years. The court of appeals affirmed without opinion (Pet. App. A).

1. Petitioner was the corporate secretary and a director of Packer, Wilbur & Co., Inc. (Packer, Wilbur), a Manhattan stock brokerage firm. In August and September of 1970, Packer, Wilbur was in serious financial trouble (Tr. 33-34). As part of its efforts to stay in business, the firm on several occasions misappropriated stock it was holding for its customers. James Gallentine, the firm's cashier and a government witness,[2] had the customers' signatures forged on stock transfer powers and transferred the stock to Packer, Wilbur. The stock was then either sold or used as loan collateral (Tr. 3, 6-7, 11-12, 40-42, 51-55, 59-62, 70-71, 77-80).

In August of 1970 petitioner asked his father to furnish the purchase money for 10,000 shares of Robotguard stock. His father agreed to give him the money, but a few days later petitioner told his father that his help was no longer needed

[1]The jury in petitioner's first trial could not agree on a verdict.

[2]Gallentine had pleaded guilty to one count of securities fraud (Tr. 31). Petitioner was tried together with Maurice Rind, the vice-president and a director of Packer, Wilbur. Rind was convicted on the same counts as those on which petitioner was convicted, and the court of appeals affirmed his conviction (Pet. App. A). Wilbur Hyman, the president of the firm, was a fugitive at the time of the trial.

(Tr. 352-354). At approximately the same time Gallentine misappropriated 10,000 shares of the Robotguard stock of one of Packer, Wilbur's customers (Tr. 67-71). During the summer of 1970, petitioner advised one customer, Mrs. Melling, against selling stock that had already been sold by Packer, Wilbur (Tr. 254-257). In March of 1971 another customer, Mr. Caplan, wrote to petitioner requesting that certain stock be delivered to his account at another firm. The stock was not delivered, and Caplan spoke to petitioner, who said that he would take care of the matter. He never had the stock transferred, however, because it had been sold (Tr. 232-238).

2. Gallentine, the firm's cashier, had testified before the grand jury that from time to time he had explained to petitioner that customers' securities were being used to obtain cash.[3] At trial, however, Gallentine testified that he had mentioned the misappropriation of customers' stock to petitioner only once—when Leasepac, Inc., had declared a stock dividend that some of Packer, Wilbur customers, who thought that they held Leasepac stock, would not receive because they were not shareholders of record. Petitioner was said to have replied that he would speak to Rind, the firm's vice-president, about the problem, and that a record should be kept of who was entitled to the dividend (Tr. 95-97). At that point the government offered Gallentine's grand jury testimony as substantive evidence under Fed. R. Evid. 801(d)(1)(A). Petitioner objected that the testimony would not have been admissible as substantive evidence if the same questions had been asked at trial, and that it should be admitted only for impeachment (Tr. 98-100). At the close of the trial, the court admitted the testimony as substantive

[3]The portion of Gallentine's grand jury testimony that was introduced at trial is set forth at Pet. 7-8.

evidence, and ruled that petitioner could challenge the weight and credibility of the testimony before the jury (Tr. 382-383).

ARGUMENT

1. Although not questioning that Gallentine's grand jury testimony constituted a sworn prior inconsistent statement of the kind Fed. R. Evid. 801(d) declares to be admissible as substantive evidence, petitioner contends (Pet. 9-13) that the testimony should nevertheless not have been received because subject to other deficiencies that would have rendered it inadmissible if it had been given as direct testimony at trial. The courts below correctly rejected this contention and upheld the admissibility of the evidence, subject, as the district court ruled, to petitioner's right to challenge its weight and credibility before the jury.

Petitioner argues that the grand jury testimony was inadmissible because the questions and answers were conclusory, that Gallentine testified as to matters as to which he lacked personal knowledge, and that he gave opinion evidence without a proper foundation in response to leading questions. These arguments are based upon a hypertechnical reading of each question and answer in isolation from the context. In essence, Gallentine simply testified to the grand jury that both petitioner and Hyman knew that he was using customers' securities to raise money, because he told them so. Since what he said to petitioner is obviously a fact within Gallentine's personal knowledge, his testimony that petitioner knew what was going on, even if viewed as containing opinion and inferences, was clearly admissible because it was rationally based on the witness's perceptions. Fed. R. Evid. 701.[4] To the extent that the grand jury

[4]Petitioner's reliance (Pet. 17-18) on *Bronston* v. *United States*, 409 U.S. 352, is misplaced. There, the issue was whether a witness's unresponsive and therefore misleading testimony constituted perjury under 18 U.S.C. 1621 even though the testimony was literally true. Here, the crime of perjury is not involved; rather, the issue is simply whether evidence is admissible at trial.

testimony might be challenged as unspecific as to when the conversations with petitioner occurred and what was said, petitioner had ample opportunity to cross-examine the witness about these matters. He also had ample opportunity to attack the credibility and weight of the testimony before the jury.[5]

2. Petitioner also challenges (Pet. 19-20) the sufficiency of the evidence on the ground that even if Gallentine's grand jury testimony was properly admitted as substantive evidence, petitioner's conviction should not be sustained solely on the basis of that testimony. But there is other substantial evidence which, when viewed, as it must be, in the light most favorable to the prosecution, amply supports the conviction. Gallentine gave direct testimony that on one occasion he told petitioner that some of the firm's customers would not receive a Leasepac stock dividend because the firm had "used" their Leasepac stock. And three other aspects of the evidence gave strong circumstantial support to the jury's inference that petitioner was involved in the scheme. First, as an officer and director of the firm, he could reasonably be deemed to be aware of the firm's financial condition and the means by which the firm was staying afloat. Second, his dealings with Mrs. Melling and Mr. Caplan permit an inference that he knew and was concealing the fact that the firm had sold their stock. Finally, his withdrawal of his request to his father for money

[5]Congress expressly provided in Fed. R. Evid. 801(d) that a trial witness's prior inconsistent grand jury testimony should not be excluded as hearsay. S. Rep. No. 93-1277, 93d Cong., 2d Sess. 15 (1974); H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 10 (1974). In thus permitting prior statements uttered under oath in non-adversary proceedings to be admitted as substantive evidence, the legislature surely was aware that such extra-trial statements would in many instances not meet the evidentiary requirements applicable in a formal trial.

to buy 10,000 shares of Robotguard stock, after the firm had taken 10,000 shares of that stock belonging to a customer, indicates that he knew of the misappropriation.

Contrary to petitioner's assertion (Pet. 19), the trial judge did not instruct the jury that Gallentine's grand jury testimony was by itself sufficient evidence to convict petitioner. Rather, the court said that Gallentine's testimony as a whole (including his trial testimony) was sufficient evidence upon which to base a conviction (see Tr. 567). Both the district court and the court of appeals considered the evidence to be sufficient. There is no reason for this Court to review further this essentially factual question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
PAUL J. BRYSH,
Attorneys.

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